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No. 82-427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ASHOK K. GUMBHIR,
Petitioner

vs.

KANSAS STATE BOARD OF PHARMACY,
Respondent

On Writ of Certiorari to the
Supreme Court of the State of Kansas

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTIONS PRESENTED

These questions pertain to a claim for attorneys' fees under 42 U.S.C. §1988 in a suit brought under 42 U.S.C. §1983 and under state law, where plaintiff recovered only on the state law claim.

1. Whether a court, in deciding whether to grant attorneys' fees under the Civil Rights Attorneys' Fees Act, 42 U.S.C. §1988, should undertake an independent re-evaluation of the merits of the plaintiff's federal constitutional claims. If so, what is the nature and extent of that evaluation?

2. Whether attorneys' fees should be awarded in an action under 42 U.S.C. §1983 where plaintiff has claimed both state and federal violations, but he prevails only on state law grounds. If so, under what circumstances should fees be granted?

3. Whether, in order for a prevailing party to obtain attorneys' fees under 42 U.S.C. §1988, it is necessary for the plaintiff's state law claims — upon which he prevailed — to arise from a nucleus of operative facts in common with the facts pertaining to the federal constitutional claims.

4. If question 3, above, is answered in the affirmative, then an additional Question is: Whether the plaintiff's state law claims and federal constitutional claims arise from "a common nucleus of operative fact", where the federal claims are not "frivolous", "wholly insubstantial" or "clearly without merit"?

5. If Question 3, above, is answered in the negative, so that a plaintiff must recover on the merits of his federal constitutional claims in order to recover

attorneys' fees under 42 U.S.C. §1988, then an additional Question is: whether the petitioner's federal constitutional claims in the present case were without merit.

ALL PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ASHOK K. GUMBHIR,
Petitioner

vs.

KANSAS STATE BOARD OF PHARMACY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of Kansas entered herein on June 11, 1982, which denied attorneys' fees to petitioner under 42 U.S.C. §1988 as a matter of law, although petitioner was the prevailing party in an action under 42 U.S.C. §1983.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas is reported at 231 Kan. 507, 646 P.2d 1078 (1981). The earlier opinion of the Supreme Court of the State of Kansas, in which petitioner prevailed because the State statute was declared unconstitutional, is reported, under the same style, at 228 Kan. 579, 618 P.2d 837 (1980).

JURISDICTION

The judgment of the Supreme Court of the State of Kansas was made and entered on June 11, 1982, and a copy of the decision is appended to this Petition at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The original action filed by petitioner called into question the constitutionality of K.S.A. 65-1631(a), Appendix I, regarding the registration of pharmacists by the respondent, when viewed against the requirements of the First, Fifth and Fourteenth Amendments of the United States Constitution, Appendices C, D and E, as well as the separation of powers provision of the Constitution of the State of Kansas, Article 2, Section 1, Appendix F.

This case also involves a claim under 42 U.S.C. §1983, set forth in Appendix G. Having prevailed on his claim under 42 U.S.C. §1983, see Appendix B and Appendix A, 231 Kan. at 516, petitioner sought attorneys' fees under the Civil Rights Attorneys' Fees Act, 42 U.S.C. §1988, Appendix H, which states the following, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioner received his undergraduate degree in pharmacy from Punjab University in Chandrigarh, India. He later received his masters degree in pharmacy from the University of Minnesota, and his Ph.D. in pharmacy administration from Ohio State University. Petitioner was registered as a pharmacist in the State of Ohio by examination and, by reciprocity, in the State of Missouri. Petitioner presently resides in Missouri where he is Professor of Pharmacy at the University of Missouri-Kansas City.

Petitioner made application to respondent — the Kansas State agency responsible for the registration of pharmacists — for registration by examination or by reciprocity. That registration was denied by respondent, based upon the Kansas statute, K.S.A. 65-1631(a), which required applicants to be recipients of undergraduate degrees from schools of pharmacy accredited by the American Council on Pharmaceutical Education (ACOPE). That Council accredits every single school of pharmacy within the United States of America, and accredits no school of pharmacy outside the United States.

Petitioner filed suit in the District Court of Johnson County, Kansas, claiming that the respondent infringed his constitutional rights and that the statute vesting authority in the ACOPE was unconstitutional on the following grounds:

> (a) the statute contains an impermissible, unconstitutional and undue delegation of authority to some private body or entity other than the Kansas

State Board of Pharmacy, and does not require nor permit defendant to exercise its own judgment;
(b) the statute is violative of the Commerce Clause, Art. 1, §8 of the Constitution of the United States;
(c) because the American Council on Pharmaceutical Education does not accredit nor approve colleges or universities other than those in the United States of America, the statute is discriminatory and violative of the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and is an improper delegation of authority;
(d) the statute is unconstitutionally vague, ambiguous and susceptible of various interpretations.
(R. Vol. I, pp. 4-5)

The district court found for respondent (R. Vol. I, p.32), and the petitioner appealed directly to the Kansas Supreme Court. (R. Vol. I, p.33) Although both state constitutional and federal constitutional grounds were alleged for reversal of the decision, the Kansas Supreme Court found the statute violative of the Kansas Constitution and, therefore, did not reach the federal constitutional grounds raised in the Petition. Appendix B, 228 Kan. at 588.

On remand, after first having to file a motion for contempt (R. Vol. I, pp. 62-73), the petitioner was finally granted registration as a pharmacist.

Petitioner then filed a Motion for Assessment of Attorneys' Fees under 42 U.S.C. §1988. (R. Vol. I, pp.74-76). The district court's denial of that motion was appealed to the Kansas Supreme Court (R. Vol. I, p.43), which issued the opinion and decision here at issue. Appendix A.

The Kansas Supreme Court held correctly for petitioner on most of the substantive issues, including the following:

1. The petitioner's claim was brought under 42 U.S.C. §1983, although that statute was not specifically mentioned in the Petition. 231 Kan. at 514.

2. An action under 42 U.S.C. §1983 may be brought in the state courts of the State of Kansas. 231 Kan. at 509.

3. Respondent, the Kansas State Board of Pharmacy, is a "person" under 42 U.S.C. §1983. 231 Kan. at 513.

4. The conduct of the respondent complained of by petitioner was performed under color of state law. 231 Kan. at 517.

5. Because attorneys' fees are assessed as "costs", they may be paid from state funds without violating the Eleventh Amendment. 231 Kan. at 513.

6. Attorneys' fees under 42 U.S.C. §1988 are an appropriate subject for relief even though that statute was not specifically mentioned in the Petition. 231 Kan. at 514-515.

7. Petitioner was the "prevailing party", because he succeeded in obtaining what he originally set out to obtain. 231 Kan. at 516.

Having found for petitioner on every issue up to that point, the Kansas Supreme Court then reviewed the merits of the federal constitutional claims (a review it did not undertake on the first appeal), in order to determine whether the federal claims arose "from a common nucleus of operative facts". The Kansas Supreme Court read *Seals v. Quarterly County Court*,

562 F.2d 390 (6th Cir. 1977), as requiring such nucleus of facts in common between the state claims (on which plaintiff prevailed) and the federal claims (which were not reached) to justify an award of attorneys' fees under §1988.

The Kansas Supreme Court then proceeded to examine each of petitioner's federal constitutional claims and to decide the validity of each. Finding each claim not to be sustained on the merits, the court concluded that the federal constitutional claims did not involve a common nucleus of operative fact with the federal claims. 231 Kan. at 523. The Kansas Supreme Court made no finding that the federal constitutional claims were "clearly without merit" or "frivolous" or "wholly insubstantial".

REASONS FOR GRANTING THE WRIT

I. THE ISSUES PRESENTED ARE NOVEL TO THIS COURT.

The opinion of the Court below decided important questions of federal law which have not been settled by this Court. See, Rule 17.1(c), Rules of the Supreme Court. The Kansas Supreme Court decided that an in-depth evaluation of the merits of federal constitutional claims must be undertaken and that there must have been merit to those federal claims before attorneys' fees can be granted under 42 U.S.C. §1988, where plaintiff has already prevailed on state law grounds in the same case. This decision by a state court of last resort has decided a federal question in a

way which conflicts with decisions of numerous federal courts of appeals. See Rule 17.1(b), Rules of the Supreme Court. Petitioner submits that, instead, a review of the federal claims should be undertaken only to determine whether they were "clearly without merit", "frivolous" or "wholly insubstantial". See, *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), cert. den. 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980).

A. The examination and evaluation by the Kansas Supreme Court violates two basic rules of judicial action: (1) that the Courts shall resolve all claims on state law grounds, if possible, in order to avoid declarations on federal constitutional grounds, *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); and (2) that the Courts shall refrain from issuing advisory opinions. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073, reh. den. 439 U.S. 883, 99 S.Ct. 227, 58 L.Ed.2d 198 (1978).

The main issue in this case is the nature and extent of the consideration to be given to a plaintiff's federal constitutional claims, once he has prevailed on state law grounds, in order to decide whether to award attorneys' fees. If a detailed evaluation of the merits of those claims is to be undertaken by the courts, then there will exist a ruling on federal constitutional issues which should have been precluded by the principle announced by this Court in *Hagans v. Lavine, supra.*

Further, because it is not necessary to a determination of the merits of the case, but only relates to the assessment of the costs, *Hutto v. Finney*, 437

U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), the review and statement of the court's opinion on the merits of the federal constitutional claims is advisory in nature. Such a ruling would infringe the principle announced by this Court in *Barthuli v. Board of Trustees*, 434 U.S. 1337, 98 S.Ct. 21, 54 L.Ed.2d 52 (1977), which held that appellate courts can only determine the parties' rights as they stand at the time of the decision. In this case, the statute had already been declared unconstitutional, so the parties' rights had already been determined. It was only advisory then to review the federal constitutionality of the statute which had already been held unconstitutional.

The petitioner submits that the correct standard is to require only that the federal claims arise from a "common nucleus of operative fact", that is, that the federal claims not be frivolous or insubstantial. This is quite different from the standard applied by the Kansas Supreme Court that requires the federal claims to have substantive merit before attorneys' fees will be granted. While petitioner still believes that his federal claims against the respondent were meritorious, petitioner further believes that the Kansas Supreme Court should be required to review the federal claims under the proper, and less stringent, standard.

B. The issue presented here is novel in this Court. Other courts which have considered the issue have only undertaken or required an evaluation of the federal claims to determine whether the federal claims, on their face, were "plainly insubstantial", "frivolous",

or "clearly without merit".[1] When combined with the general principle that prevailing plaintiffs should ordinarily be granted their attorneys' fees in the absence of extraordinary circumstances, *Mid-Hudson Services, Inc. v. G. & U., Inc.*, 578 F.2d 34 (2nd Cir. 1978), the review procedure prescribed by those courts is clearly more in accord with the ends of justice than that imposed by the Kansas Supreme Court in the present case. Petitioner requests this Court to resolve that disparity in opinions and to hold that attorneys' fees should be awarded to the plaintiff prevailing on state law grounds unless the federal claims were frivolous, wholly insubstantial or clearly without merit.

II. THE ISSUES PRESENTED ARE OF IMPORTANCE TO THIS COURT.

In Addition to being novel, the questions presented here are important to the administration and application of the Civil Rights Attorneys' Fees Act. The Kansas Supreme Court's imposition of such a hurdle to plaintiffs' recovery of attorneys' fees runs contrary to the general attitude which favors attorneys' fees awards in the type of case which is beneficial to society, such as the present case, *Arkansas Community Organizations for Reform Now v. Arkansas State Board of Optometry*, 468 F.Supp. 1254 (E.D. Ark. 1979), unless "special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

1. See, e.g. *Southeast Legal Defense Group v. Adams*, 436 F.Supp. 891 (D. Ore. 1977); *Keith v. Volpe*, 86 F.R.D. 565, 569 (C.D. Cal. 1980); *Morgan v. McDonough*, 511 F.Supp. 408, 414 (D. Mass. 1981). See also, *Nadeau v. Helgemoe*, 518 F.2d 275 (2nd Cir. 1978).

III. PETITIONER PROPOSES A STANDARD TO RESOLVE THE DISPARITY OF DECISIONS.

A. Petitioner submits that this Court should hold that the standard to be applied in cases of this nature is that the state law claims should arise from a nucleus of operative fact in common with the federal claims, but that an evaluation of the merits of the federal claims is unnecessary and impermissible. Such a standard will preclude the joinder of plainly insubstantial federal claims under 42 U.S.C. §1983 with ordinary tort claims merely in the hope of obtaining attorneys' fees under 42 U.S.C. §1988. But the standard will preserve the beneficent intention of §1988 of aiding in the vindication of constitutional rights.

B. The term "common nucleus of operative fact" had its genesis in the decisions relating to pendent jurisdiction in the federal courts. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

The major error of law by the Kansas Supreme Court in this case was its misinterpretation of the "common nucleus of operative fact" standard. Rather than requiring an evaluation of the merits of the previously undecided claims, this standard only requires a determination of the "substantiality" of the undecided claims, i.e., whether the claims are "wholly insubstantial", "obviously frivolous", "plainly insubstantial" or "obviously without merit." *Hagans v. Lavine, supra*, 415 U.S. at 537. See also *California Water Service Company v. Redding*, 304 U.S. 252, 58 S.Ct. 865, 82 L.Ed. 1232 (1938). The state law claim and the federal law claim must be interrelated so that the

plaintiff would be expected to try them in a single judicial proceeding. *United Mine Workers v. Gibbs, supra,* 383 U.S. at 725.

Even an adverse determination on the related claims did not automatically preclude federal jurisdiction over the pendent claims in *Hurn v. Oursler,* 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933), and *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation,* 305 U.S. 315, 59 S.Ct. 191, 83 L.Ed. 195, reh. den. 305 U.S. 675, 59 S.Ct. 356, 83 L.Ed. 437 (1938). Thus, the determination of the merits of petitioner's federal claims in the present case was a misapplication of the "common nucleus of operative fact" standard.

C. This "common nucleus" standard has been applied consistently by the lower courts in cases involving 42 U.S.C. §1988 where plaintiff has already recovered on state law grounds.[2]

The number of cases cited demonstrates that this issue is being raised regularly in the lower courts and that it should be resolved by this Court.

Further, the principle proposed by petitioner is consistent with the inclination and history of the courts

2. See, *Seals v. Quarterly County Court, supra,* 562 F.2d 390 (6th Cir. 1977); *Southeast Legal Defense Group v. Adams,* 436 F.Supp. 891 (D. Ore. 1977); *White v. Beal,* 447 F.Supp. 788 (E.D. Pa. 1978); *Bond v. Stanton,* 555 F.2d 172 (7th Cir. 1977); *Lund v. Affleck,* 442 F.Supp. 1109 (D. R.I.), aff'd. 587 F.2d 75 (1st Cir. 1978); *Gagne v. Maher,* 594 F.2d 336 (1st Cir. 1979); *Northcross v. Board of Education, supra,* 611 F.2d 624 (6th Cir. 1979), cert. den. 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980); *Kimbrough v. Arkansas Activities Association,* 574 F.2d 423 (8th Cir. 1978); *Oldham v. Erlich,* 617 F.2d 163 (8th Cir. 1980); *Peeler v. Longview Independent School District,* 485 F.Supp. 117, 121 (E.D. Tex. 1979); *Burchett v. Bower,* 470 F.Supp. 1170 (D. Ariz. 1979).

in awarding attorneys' fees under 42 U.S.C. §1988 even where there has been a settlement or consent decree, thus precluding any determination of the particular ground (i.e. federal or state) upon which the plaintiff recovered. *Mental Patient Civil Liberties Project v. Hospital Staff Civil Rights Committee,* 444 F.Supp. 981 (E.D. Pa. 1977); *Willett v. Chester Water Authority,* 447 F.Supp. 967 (E.D. Pa. 1978); *Inmates of Nebraska Penal and Correctional Complex v. Greenholz,* 567 F.2d 1381 (8th Cir. 1977).

D. The use of this approach to the "common nucleus" standard in §1988 cases is justified by the legislative history of 42 U.S.C. §1988, which also demonstrates that Congress anticipated the cases where plaintiffs recover on state law claims thereby precluding consideration of their federal law claims.

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see *Hagans v. Lavine, supra; United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), attorney's fees may be allowed even though the court declines to enter judgment for plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'
>
> *H.R. 94-1558,* 94th Cong., 2d Sess., p.4, n.7 (1976).

This history demonstrates the congressional concern that plaintiffs not be denied their attorneys'

fees merely because they recovered on state law grounds. The Congressional intent is to deny fees only where the federal claims were insubstantial.

E. Why should the courts allow attorneys' fees under 42 U.S.C. §1988 even where the associated federal claims brought under 42 U.S.C. §1983 do not appear, retrospectively, to have been sustainable on the merits?

First, the Civil Rights Attorneys' Fees Act was designed to encourage the assertion of the public interest, and §1988 is to be liberally construed in favor of granting attorney's fees to the party who prevails. *Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir. 1981); *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980). Thus, the Attorney's Fees Act should be interpreted to allow attorney's fees in those cases in which plaintiff prevails and, in so doing, asserts the public interest. The only proviso should be that plaintiff must not have joined a federal claim frivolously or without any foundation. If there was at least arguable foundation for asserting the federal claims at the outset, and the plaintiff does ultimately prevail, then the public interest has been asserted, a sufficient federal nexus has been established, and attorney's fees should be awarded.

Secondly, to permit a review of the merits of the federal claims only to determine the attorneys' fees claim, would encourage post hoc rationalization by the court; the announced decision on the merits of the federal constitutional claims might well be colored by the court's view of whether attorneys' fees should be granted in that particular case. Cases of constitutional

dimension should be decided, if at all solely for the purpose of determining the substantive issues and rights of the parties before it. Such decisions should not be made solely as a first step toward deciding whether to grant attorneys' fees to the prevailing party. Discretion is expressly built into §1988, so that such rationalizations under the guise of considering the merits of the federal claims should be unnecessary.

Thirdly, the statute itself does not require that the prevailing party have obtained his results under the various cited Civil Rights Act in order to receive attorneys' fees. Section 1988 provides that attorneys' fees may be granted to the prevailing party "(i)n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title..." From this it is apparent that Congress did not intend to require a party to prevail on the merits of a claim brought under the Civil Rights Acts, but only to prevail, i.e. obtain results, in an action to enforce those Acts. See, S.Rep. No. 1011, 94th Cong., 2d Sess. 5, reported in 1976 U.S. Code Cong. & Admin. News, pp. 5908, et seq.:

> (F)or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.

IV. PETITIONER'S FEDERAL CONSTITUTIONAL CLAIMS WERE MERITORIOUS.

If a consideration of the merits is necessary and if the Kansas Supreme Court was, therefore, correct in its interpretation of the court's task under 42 U.S.C. §1988, then that Court erred in finding that petitioner's claims under the United States Constitution could not be sustained on their merits. This Court should grant certiorari in order to resolve this matter because the Kansas Supreme Court's decision is contrary to decisions of other courts and decisions of this Court. Petitioner continues to contend that the state statute which required applicants for registration to be recipients of undergraduate degrees from schools approved by the ACOPE was violative of petitioner's right to equal protection under the law and that the classification scheme was not reasonably calculated to achieve its stated objective. The statute also violated petitioner's liberty interest under the Fourteenth Amendment.

A. The statute as worded did not advise applicants for registration of the requirements necessary for their applications to be considered and approved. Standards applicable to the practice of one's profession must be reasonable and based upon valid and sustainable grounds. *Morey v. Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1956). That rule includes the need for specificity to apprise prospective registrants of what the law requires. Because no reference or implication was contained in the statute that domestic *undergraduate* degrees are required, the statute was unconstitutional as being vague and as not giving

notice of what was required to comply therewith. The statute was not set out in terms that the ordinary person exercising ordinary common sense could sufficiently understand and comply with.

B. The statute also violated the equal protection clause of the Fourteenth Amendment because it created an unreasonable classification. The classes created by the statute, as interpreted by respondent, were (1) those who received *undergraduate* degrees from a school or college of pharmacy accredited by the ACOPE, i.e., an American university, and (2) all other pharmacists, no matter how highly qualified, even though they may have graduated (by receiving post-graduate, masters or doctoral degrees) from schools, colleges or universities accredited by the ACOPE. There was no reasonable justification for such classifications and the statute operated to the constitutional detriment of those who were in fact qualified but who did not meet the arbitrary statutory provisions as interpreted.

This question was directly confronted in *Wong v. Hohnstrom*, 405 F.Supp. 727 (D. Minn. 1975). In that case, an alien was licensed to practice pharmacy in the States of California and Nevada. Upon moving to Minnesota, he applied for registration by examination in that state. The registration statute in Minnesota provided that aliens could not apply for registration as pharmacists in that State. In ruling that statute to constitute a violation of the equal protection clause of

the Fourteenth Amendment of the United States Constitution, the Court held.:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure...
>
> By denying aliens the opportunity to take the examination to become a registered pharmacist, the State of Minnesota has denied them access to one of the 'common occupations of the community.'

405 F.Supp. at 729.

The Court thus concluded that denying aliens the right to become registered in the State as pharmacists denied the applicants their equal protection under the law.

As a citizen of the United States of America at the present time, one of the remaining vestiges of petitioner's alien birth is the fact of his graduation from Punjab University in Chandrigarh, India. It is this vestige of his alien birth for which the respondent sought to punish plaintiff by denying him registration and enforcing the invalid statute. The right to practice his profession unhindered by unreasonable classification schemes is "the very essence of the personal freedom and opportunity" that petitioner sought in coming to the United States of America. Being highly qualified to perform his chosen work, a professor of widely recognized ability, petitioner was met by the respondent with an archaic and discriminatory response: that he was not "qualified".

Petitioner submits that the classification scheme established by the Kansas pharmacy registration statute was not reasonably calculated to obtain its intended purpose, but that, in fact, this Court should strictly scrutinize the classification scheme and evaluate the invalidity of the alleged basis therefor. *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed. 2d 534 (1971); *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); *United States v. Karnes*, 437 F.2d 284 (9th Cir. 1971).

Respondent contended below that the classification scheme was valid and reasonable because it prevented "unqualified" pharmacists from becoming registered to practice in Kansas and thereby protected Kansas citizens from untoward or unexpected incidents from incorrect prescriptions.

The classification scheme failed to accomplish that end for at least two reasons.

First, the classification excluded a potentially great number of persons, such as petitioner, who are qualified to practice by reason of their attending schools which the ACOPE, for unknown and possibly discriminatory reasons, did not choose to accredit, i.e., schools which are located outside the United States. The classification scheme also excludes those applicants, such as the petitioner, who have received post-graduate degrees from accredited schools but who received their undergraduate degrees from unaccredited (foreign) schools of pharmacy.

Secondly, there is no guarantee that the fact of graduation from an ACOPE accredited undergraduate

school of pharmacy automatically renders the applicant qualified to practice in this State.

That is especially true when the Board made no inquiry into the ACOPE's standards or the application of those standards by the ACOPE. The respondent conceded below that it did not review or apply the ACOPE's standards, but merely approved or disapproved an applicant based on whether the applicant's undergraduate school was listed on the ACOPE list. (R. Vol. II, p.9)

The respondent had no knowledge of what standards, if any, the ACOPE utilized in arriving at its list of "accredited" schools. How could it then argue that the ACOPE accreditation assures quality of pharmacy practice in the State of Kansas?

A classification scheme under a licensing statute must be reasonable in order to satisfy the equal protection clause. *Bradley v. Richmond*, 227 U.S. 477, 33 S.Ct. 318, 57 L.Ed. 603 (1913). Classifications based upon alienage have consistently been held suspect under the Fourteenth Amendment, requiring strict scrutiny by the Court of the rationale claimed to support such distinctions. Petitioner contends that this is no less true when a vestige of alienage still provides the basis for such distinction.

Because petitioner was not permitted to practice his chosen profession in the State of Kansas, he was being denied a liberty interest under the due process and equal protection clauses of the Kansas and United States Constitutions.

> In so far as a man is deprived of the right to labor his liberty is restricted...
>
> *Smith v. Texas*, 233 U.S. 630, 636, 34 S.Ct. 681, 58 L.Ed. 1129 (1914).

Respondent has a constitutionally secured right to practice his profession.

> The Fourteenth Amendment guarantees an individual the right to engage in any of the common occupations or professions of life. Such a right is both a "liberty" and "property" right protected from state deprivation or undue interference. *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Larkin v. Bruce*, 352 F.Supp. 1076 (Wis. 1972).
>
> *Keker v. Procunier*, 398 F.Supp. 756, 760 (E.D. Cal. 1975).

Because the petitioner has a constitutional right of liberty and property, strict scrutiny of any classification scheme affecting those rights must be made by the Court to determine whether there is a reasonable basis for the classification. As shown above, there was no reasonable basis for the classification, it violated constitutional rights, and there were numerous reasonable alternatives. The Board should have been compelled to use, rather than ignore, some reasonable standards in registering pharmacists to practice in this State. Because the Board did not use any standards and because the statute violated appellant's right to due process and equal protection, it should now be held to have been unconstitutional under the Fourteenth Amendment.

The above review demonstrates that the decision by the Kansas Supreme Court on the merits of petitioner's federal constitutional claims was not only unnecessary in light of the "common nucleus" standard, but was, also, erroneous if the "common nucleus" standard is not applied. The registration statute infringed petitioner's federal constitutional rights and, therefore, petitioner should be held to be the "prevailing party" even under this higher standard.

V. CONCLUSION.

In conclusion, petitioner respectfully requests that a writ of certiorari issue to the Kansas Supreme Court so that these novel and important issues may be resolved.

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